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IN THE
SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 3, 1988

ROGER TEETER AND JENNIFER TEETER
D/B/A SKY'S THE LIMIT,
PETITIONER.

VS.

GRAVITY GUIDANCE, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Misleading Statements Of Gravity Guidance

At the top of page 3 of the Gravity Guidance Opposition, the summary of Teeter's "Questions Presented for Review" is reasonably accurately summarized with respect to whether the District Court and the Court of Appeals,

> disregarded consideration of the issue of obviousness under 35 U.S.C. § 103;
>
> disregarded the claims in the patent in holding the patent to be valid; and
>
> avoided consideration of the prior art of record when all of the

evidence in the case was documentary in the form of prior U.S. patents.

Then follows vague innuendos without definition or explanation.

At the bottom of page 3 and top of page 4, the Opposition states:

> Teeters mischaracterize the nature of the proceedings below both at the District Court level and the Appellate Court level.

The "mischaracterization" is not identified.

Near the bottom of page 4, the Opposition states that Teeter knew about the Gravity Guidance patent but chose to enter the market "with their infringing product" apparently insinuating that the Teeter product was a carbon copy of the Gravity Guidance product, whereas the District Court found that Teeter did not

literally infringe upon the Gravity Guidance patent rights but infringed only under the doctrine of equivalents (Petition APPENDIX A, p. 2a, items 2 and 3).

The representation of Gravity Guidance at the bottom of page 4 that the trial court and the Court of Appeals found that Teeter was "without any reasonable basis" to enter the market with his "infringing product" is unsupported both by the decision of the District Court and by the decision of the Court of Appeals.

The Opposition continues at the bottom of page 6 with the statement (emphasis supplied):

> Teeters' inaccurately portray the District Court and the Court of Appeals as ignoring fundamental precepts of both the patent law and procedural rules in dealing

with their summary judgment motion for invalidity.

Teeter does indeed portray the District Court and the Court of Appeals as ignoring the fundamental precepts of the patent law by failing to take into consideration the requirements of 35 U.S.C. § 103 mandating that the Court consider the question of obviousness of "an invention" over the prior art, and Gravity Guidance does not explain why Teeter's portrayal of the action of the District Court and the Court of Appeals in this regard is "inaccurate".

Similarly, "proper procedure" would have been for the District Court and the Court of Appeals to apply the requirement of 35 U.S.C. § 103 as to new prior art cited by Teeter in their

procedure of acting on the case, which they did not do. Again, Gravity Guidance does not explain why it considers this noncompliance with procedure mandated by the Supreme Court to be "inaccurately portrayed" by Teeter.

The assertion of Gravity then continues at the top of page 7:

> In fact, as borne out clearly by the record and the respective judgments of Courts, the Trial Court found . . . that the Teeters did not meet their burden of proof of showing invalidity.

The only ruling or finding that the trial court made was in the Order of June 10, 1986 (Petition APPENDIX A, p. 2a) was:

> 5. The patent rights asserted by Plaintiff are valid.

The Opposition continues at the bottom of page 7:

> In kind, the Court of Appeals decision explicitly stated that [emphasis supplied]
>
> > ". . . the District Court correctly determined that Teeter had failed to carry its burden to establish anticipation . . . .

Thus, the Court of Appeals did not adhere to the language of the ruling made by the District Court.

At the top of page 9, the Opposition states (emphasis supplied):

> After due consideration, Gravity Guidance prevailed at the Trial Court level. Quite simply, the Teeters could not and did not meet their high burden of proof.

As pointed out above, the District Court did not make such a finding.

The Opposition then continues on page 9 (emphasis supplied):

> The Appellate Court simply concurred that the Teeters' failed in carrying that burden.

As stated above, the District Court did not make such a statement with which the appellate court could concur. Also this statement of the appellate court specified only anticipation and did not treat the question of "obviousness" under 35 U.S.C. § 103.

The Opposition concludes this discussion at the bottom of page 11 with the statement (emphasis supplied):

> The cases cited by the Teeters, with the implication that either the Trial Court or the Court of Appeals did not follow established case law, are again only conclusory, self-serving characterizations, which are based on their flawed and inaccurate portrayal of the proceedings.

This innuendo is not explained and is strenuously challenged by Teeter.

Questions for Review
Criticized by Opposition

At the middle of page 9, the Opposition states (emphasis supplied):

> The issues the Teeters' now present as alleged questions for review are either inaccurately portrayed or were waived in their two chances before the Trial Court and the Court of Appeals.

As discussed above, while Gravity Guidance makes accusations against the Petition of Teeter, there is no explanation as to in what respect or respects the issues are "inaccurately portrayed" or "were waived". The Opposition does not contend that there was

> any ruling, either by the District Court or by the Court of

Appeals on the question of obviousness under 35 U.S.C. § 103; or

any discussion of the claims of the Martin patent; or

any evidence in the case other than documentary.

Also, the Opposition does not specify how or when any of the three questions presented for review were "waived" by Teeter.

Allegation of Opposition That The Supreme Court is Without Authority To Grant the Petition is Unfounded

At the top of page 2, the Opposition states:

> . . . the alleged issues presented for review do not even approach the special and important reasons which this Court considers in deciding whether review should be taken.

At the bottom of page 9, the Opposition then states:

> To invoke jurisdiction of the Supreme Court of this land, the very Rules of this Court provide that "special and important reasons" must form the basis for consideration for such review. This is neither an ambiguous nor a meaningless standard. There must be a clear, direct and readily apparent conflict in the courts, or an issue of compelling public importance for the court to consider review. The importance must be "to the public as distinguished from" the particular "parties" involved.

It is respectfully submitted that whenever there is a miscarriage of justice in the judicial system, <u>such miscarriage is of "public" importance and concern</u>. This situation is contemplated by Rule 17 of the Supreme Court which states (emphasis supplied):

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

As has been pointed out in Teeter's Petition, the failure of the Court of Appeals

(1) to consider the question of obviousness under 35 U.S.C. § 103,

(2) to consider the claims of the patent in issue and

(3) to reevaluate the documentary evidence

constitutes a drastic departure "from the accepted and usual course of judicial proceedings" in patent cases as established by the Supreme Court and the Court of Appeals for the Federal Circuit.

Moreover, in affirming the judgment of the District Court the majority of the panel of the Court of Appeals "sanctioned such a departure by a lower court" since there is no indication that the District Court considered the question of "obviousness" with respect to invalidity of the patent or considered the claims of the patent.

At the bottom of page 10, the Opposition states that:

> The Teeters' do not specify with clarity what reason they believe merits review by this Court.

It is hoped that the statement immediately above will clarify why Teeter believes that his Petition should be granted sufficiently to be understood by Gravity Guidance.

It is to be noted that Teeter's Petition does not seek that the Supreme Court retry, or even review, the position of the District Court and the affirmance of the Court of Appeals on the merits of the case, but would like the Supreme Court to exercise its power of supervision in the hope that it will direct the Court of Appeals to give consideration to the claims of the patent in light of the requirements for patentability

specified by the statute 35 U.S.C. § 103.

At the bottom of page 10 and top of page 11 the Opposition states:

> . . . it is clear that any of the questions presented for review by the Teeters are not of the urgent or compelling nature for which this Court should exercise its supervision.

The Supreme Court has expounded at length on the importance of 35 U.S.C. § 103 in the fifteen page decision of Graham v. John Deere Co. of Kansas City et al., 383 US 1, 148 USPQ 459 (Sup. Ct. 1966) discussed in the Teeter Petition at pages 16, 17 and 18 and it is unseemly for a Federal Court of Appeals to simply disregard this extremely important aspect of a patent case and also disregard the claims of the patent which are its heart, as

required by 35 U.S.C. § 112, even though the District Court also disregarded the patent claims and the mandate of 35 U.S.C. § 103.

The conduct of the Court of Appeals in failing to correct the erroneous procedure and resultant opinion of the District Court is even less excusable when the dissenting judge of the three-judge panel did consider the question of obviousness at Teeter's APPENDIX C, page 8a, and considered the claims at page 10a to 12a.

While the Opposition states at the top of page 12:

> . . . Teeters' Petition for Certiorari is devoid of any special or important reason for the Court to entertain review.

it is again emphasized that the Petition does not contemplate the

Supreme Court reviewing the merits of this litigation, but only hopes that the Supreme Court will exercise its power of supervision to direct the Court of Appeals to perform its function properly.

The Opposition comments at the middle of page 13 that (emphasis supplied):

> There is no preeminent or universally important law which has been decided or have been breached in the Courts below . . . .

That is precisely the crux of the Teeter position. The "important law" 35 U.S.C. § 103 was not decided by the courts below but appears not to have been considered by those courts.

Assertion of Gravity Guidance
That Teeter's Position is Frivolous

Gravity Guidance seeks "appropriate damages" for Teeter bringing his Petition stating at the bottom of page 13 of the Opposition:

> Under Supreme Court Rule 49.2, it is submitted that Teeters' petition is friv[o]lous.

The word "frivolous" according to Webster's Third New International Dictionary, Unabridged, G. & C. Merriam Company, Publishers, Springfield, Massachusetts, 1981, means:

> 1 : of little weight or importance : having no basis in law or fact . . . .

Certainly, Teeter's Petition, Supplemental Brief and Reply to the Opposition of Respondent sets forth ample basis in law for supporting the Petition.

Moreover, Teeter does not consider that being saddled with a judgment of almost 2-1/2 million dollars plus attorney's fees, which resulted from what the dissenting judge of the Court of Appeals (Petition APPENDIX C, p. 7a) considered to be an improper decision by the majority of the panel and by the District Court, is a matter

> . . . of little weight or importance . . . .

so as to be "frivolous".

DATED this 27th day of December, 1988.

Respectfully submitted,

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